in extremis, (he died some four hours later), and that he would naturally concur in anything suggested to him, but would be unable himself to add substantially to the statement or to correct any false impressions. The learned Magistrate first agreed that "the statement was recorded by question and answer." He also stated however, that he was not aware, until the deceased made his statement, that the appellant was the alleged assailant. Had this been the case, the defence's criticism of the statement must have been largely invalidated; but it is clear that the Magistrate was in error. Counsel for the appellant stated that at the trial he had asked that the preliminary memorandum, made by the Magistrate before recording the deceased's statement, should be put in evidence, but that the learned Deputy Public Prosecutor objected and the Court refused the request. This did not appear from the record; but it did appear that the learned Magistrate had used the memorandum at the trial to refresh his memory, and we decided — the learned Deputy Public Prosecutor who appeared on the appeal not objecting — to refer to it. Its terms show beyond possibility of doubt that the Magistrate's evidence was wrong and that, as the defence suggested, he was aware, before recording the deceased's statement, that the appellant was alleged to be the assailant. It is easy to see that in such circumstances the deceased may have been asked, "Did Naranjan Singh assault you?", and answered, "Yes", but was *not* asked, "Was Mohan Singh present, and did he also assault you?", to which he might also have answered, "Yes". The Magistrate denied that such leading questions had been asked, but, in view of the inaccuracy of his recollection on the point referred to above, we can place no confidence in that denial. We accordingly consider that the dying deposition, if admitted at all, was open to serious criticism, and the assessors should have been warned of the danger of relying too strongly upon it. We desire to stress once more that it is desirable that, where a deposition is made in answer to questions, the record should show the questions asked and the answers given. If this is not done, the value of the deposition may fairly be questioned, although a detailed record might show the criticism to be unjustified. In this case, however, the dying deposition should not have been admitted in evidence at all, for it was never formally proved. The deceased spoke Punjabi. There is no evidence that the Magistrate understands Punjabi and since he used an interpreter, it may be presumed that he does not. The interpreter, who interpreted from Punjabi to English, was not called. A dying deposition cannot be proved merely by the production of the document; it must be shown affirmatively that the document accurately represents what the deceased said. Where the statement is made in a language which the recording Magistrate does not understand, the evidence of the interpreter (or of some person who understood the words spoken) is indispensable.

It is impossible to say that, in the absence of the dying deposition, the assessors would still have found the accused guilty of murder. We think that they could not safely so have found. Accordingly, the appeal is allowed, and the conviction and sentence are set aside.

Appeal Allowed.

FAZAL DIN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson and Briggs, JJ.) September 17, 1948]

[K.L. — Criminal Appeal No. 85 of 1948]

Penal Code S. 302 — Evidence necessary that body on which post-mortem examination is held is that of deceased — Defence of Alibi — Direction of trial Judge — Criminal Procedure Code S. 422.

This was an appeal from the conviction of the appellant for murder. At the appeal it was argued (1) that as there was no evidence that the body on which the post mortem examination was conducted by the Medical Officer was the body of the deceased, the Police Constable who brought the body to the hospital not having been called by the prosecution at the trial, the evidence of injuries and the cause of death given by the Medical Officer could not be associated with the deceased and therefore there was no evidence as to how the deceased had been killed; (2) that since the deceased had been left alone at the scene after the three Indian witnesses had left to make a report to the police, and since there was no evidence establishing that the deceased was dead at the time, there was a possibility which was never put to the assessors by the learned trial Judge that the deceased may have died from violence from a source other than the beating he received from the appellant and his co-assailant; (3) that the learned trial Judge misdirected the assessors in directing them that the appellant might have deliberately kept his defence of alibi "up his sleeves" until the trial.

Held, (1) that where a case involves the death of a person on which a post-mortem examination has been held, evidence must be given that the body on which the Medical Officer conducted the post-mortem examination was the body of the deceased in respect of whose death the charge has been laid and that because of the failure to do so in this case, the conviction for murder could not be sustained; (2) that the failure of the trial Judge to put the possibility that the deceased might have died from violence from a source other than the accused, amounted on the facts of the case to a misdirection; (3) that there is no objection to a trial Judge commenting in his summing up to the Assessors on the failure of an accused person to disclose his alibi defence at the Preliminary Enquiry provided (a) the trial Judge points out that the Preliminary Enquiry is the first opportunity an accused person has of disclosing such a defence and (b) that the trial Judge directs the Assessors that failure to disclose an alibi defence at the Preliminary Enquiry is

a matter which may detract from the weight to be given to such evidence; (4) that the learned trial Judge misdirected the assessors in this case in that instead of confining his comments to the weight to be given to the alibi, he suggested to them that the appellant might have deliberately kept this defence "up his sleeve" until the trial.

Cases referred to :—

(1) *R. v. Chhui Yi* (1936) M.L.J. 177.

(2) *Haji Sulaiman v. Public Prosecutor* (1941) F.M.S.L.R. 183; (1948) M.L.J. 32.

(3) *R. v. Littleboy* 24 C.A.R. 192.

CRIMINAL APPEAL.

F. J. Woodward for the Appellant.

F. G. Cooke (D. P. P.) for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Willan, C. J. : — The appellant was convicted of the murder of a Sikh named Achar Singh. The date of the offence was the 7th June, 1948.

The facts are that the deceased and three other Indians — Lall Din, Shah Mohamed and Ali Mohamed (all witnesses at the trial) — lived in one house which belonged to the deceased. Those three Indian witnesses all retired to bed in that house about 8 p.m. on the 7th of June, 1948, and their evidence is that they were awakened at about 9 p.m. by shouts from outside the house by the deceased that he was being killed. At that time there was a small kerosene oil lamp — a tin lamp with a wick but without a glass — burning in the deceased's house, and each of those three witnesses said that that lamp gave sufficient light to enable them to see what was happening outside the house. Their evidence as to what happened is generally consistent, and is that each of them saw the appellant and another Sikh, named Duleep Singh, beating the deceased with sticks. They had each of them known the appellant prior to this incident. Each said that, after beating the deceased, both the appellant and Duleep Singh left him lying on the ground and ran away. After that these three Indian witnesses all went to the police station to report what had happened. Their time of arrival at the police station is fixed by the Inspector who investigated this case, at 9.35 p.m.

Before leaving the scene to make their report to the police it is doubtful whether any of them went up to the deceased, who was lying on the ground, to ascertain whether or not he was then dead. As this is of some importance it is necessary for us to examine the evidence which we now proceed to do.

After the appellant and Duleep Singh had run away Lall Din called out to the appellant by name and received no reply from him. That was the evidence of Lall Din at the trial. But, at the Preliminary Enquiry, Lall Din gave somewhat different evidence on this point, and his deposition was put in evidence at the trial. Before the committing Magistrate he said that after the appellant and Duleep Singh had run away he, Lall Din, went up to the deceased and spoke to him. He said that the deceased could not speak — "he was injured on the head — he was bleeding on the head — *he appeared to be alive*".

Shah Mohamed said that after the appellant and Duleep Singh had run away he, Shah Mohamed, and the other two witnesses Lall Din and Ali Mohamed called out to the deceased by name and received no reply.

Ali Mohamed gave no evidence on this particular point.

The importance of this, as appears later in this judgment, is that when these three witnesses all went to the police station to make a report they left the deceased alone at the spot, and it is doubtful whether he was then dead. In fact the evidence given at the trial as to his condition is indefinite, and so we are thrown back on the more definite evidence given by Lall Din at the Preliminary Enquiry that at that time the deceased appeared to be alive.

Continuing with the facts, the Investigating Police Officer went to the scene with the three Indian witnesses, arriving there about 9.50 p.m. that night. There he found the deceased lying motionless on the ground and, beside him, found a heavy club which was put in evidence at the trial as Exhibit P. 1.

Two important points emerge from the evidence of the Police Inspector. They are :—

(1) He gave no evidence of sending the body of the deceased to the hospital for post mortem examination.

(2) He took possession of Exhibit P1 and sent it to the Institute of Medical Research, Kuala Lumpur, to be examined for blood stains in the usual manner.

Regarding (1), there is no evidence that the body on which the Medical Officer conducted the post mortem examination was the body of the deceased. Turning to the evidence of the Medical Officer on this point, he said :—

> On 7th June, 1948, in the evening, I received the dead body of a Sikh at 10.15 p.m. The body was identified by P.C. 9185. The name was given as Achar Singh. I held a post mortem on the body on 8th June, 1948, at 9.40 a.m. Before the post mortem the body was again identified by P.C. 9185.

P.C. 9185 was not called to give evidence at the trial, though it appears from the record that he was present in Court and was tendered for cross-examination. Counsel for the defence did not wish to cross-examine him. That being so, the evidence given by the Medical Officer as to the identification of the body on which he performed the post mortem examination is hearsay and inadmissible. Accordingly there is no admissible evidence on the record that the Medical Officer performed a post mortem examination on the body of the deceased, but merely that he did perform a post mortem examination on the body of a Sikh as to whose identity there was no evidence.

Regarding (2), the club, Exhibit P. 1, found by the Investigating Police Officer beside the body of the deceased, was not identified by anyone at the trial. As to the exhibit the evidence of the three Indian witnesses is as follows:—

(a) **Lall Din** said he could not identify either of the sticks used by the appellant and Duleep Singh when they were beating the deceased.

(b) **Shah Mohamed** said that he had never seen Exhibit P1 with the deceased and that he did not know to whom it belonged.

(c) **Ali Mohamed** said that he had never seen Exhibit P1 before, and then went on to make the important statement that the sticks used by the appellant and Duleep Singh to beat the deceased were not like Exhibit P1.

Finally, as regards Exhibit P. 1, the Chief Chemist of the Institute of Medical Research certified that he found human blood on it.

Mr. Woodward, Counsel for the appellant, put forward several grounds why the conviction for murder cannot stand, but concentrated his arguments on three main grounds, and these he argued admirably. They are:—

First — that since there was no evidence that the body on which the post mortem examination was conducted by the Medical Officer was the body of the deceased, the evidence of injuries and the cause of death given by the Medical Officer could not be associated with the deceased. Therefore there was no proof as to how the deceased had been killed, and there was no evidence that the precise injuries described by the Medical Officer were those inflicted on the deceased. Without the medical evidence the only other evidence as to the injuries on the deceased was not such that one could find from it that the injuries were likely to cause death. The only proof of the intention of the assailants was to be inferred from the nature of the injuries themselves. If the injuries had been such as described by the Medical Officer, there is no doubt that an inference of intention to murder could properly be drawn, but without the medical evidence no such inference is possible.

Secondly — that since the deceased had been left alone at the scene after the three Indian witnesses had left to make a report to the police, and that since there was no evidence establishing that the deceased was dead at that time, there was a possibility which was never put to the Assessors by the learned trial Judge that the deceased may have died from violence from a source other than the beating he received from the appellant and Duleep Singh.

Thirdly — that the appellant's defence of an alibi was put to the Assessors by the learned trial Judge in a way which amounted to misdirection.

Regarding the first ground, we have already decided there is no evidence that the Medical Officer performed the post mortem examination on the body of the deceased, and this was conceded by the Deputy Public Prosecutor at the hearing of the appeal. (He is not the same Deputy Public Prosecutor who prosecuted at the trial). Accordingly this ground of appeal must succeed. We are unable to understand why the Deputy Public Prosecutor at the trial failed to call P.C. 9185 to identify the dead body to the Medical Officer, particularly as that police constable was present in Court at the trial.

The Deputy Public Prosecutor who appeared at the hearing of the appeal, realising that the failure to call that police constable to give evidence at the trial is fatal to sustaining the conviction for murder, requested us to grant a new trial. In our view to accede to such a request would be wrong. It is not for this Court to grant a new trial when the prosecution have failed to call a necessary witness at the trial, especially when such witness was available to them and was present in Court at the trial.

As regards the second ground — i.e. the possibility that the deceased may have died from violence from a source other than the beating he received from the appellant and Duleep Singh at first sight, merely taking into account that the deceased was left alone for some time when the three Indian witnesses went to make a report to the police, such a possibility may not appear to deserve more than momentary consideration in connection with the question whether the prosecution had proved the case beyond all reasonable doubt. But when the evidence relating to Exhibit P. 1 is taken into account such a possibility ought to have been fully considered at the trial and put to the Assessors.

From the evidence of the three Indian witnesses referred to earlier in this judgment it is clear that Exhibit P. 1 was not one of the sticks used by either the appellant or Duleep Singh to beat the deceased. Nor, according to their evidence, does it seem probable that Exhibit P. 1 belonged to the deceased. Therefore it follows from that evidence that Exhibit P. 1 probably

belonged to some person other than the appellant, Duleep Singh or the deceased. Remembering that Exhibit P. 1 was found to be stained with human blood and was found by the side of the deceased, there was thus evidence that a blood stained weapon, probably belonging to some third party, was found on the scene, and therefore the possibility of the deceased having met his death by violence from a source other than the beating he received from either the appellant or Duleep Singh had some substance. In fairness to the learned trial Judge, it ought to be mentioned that neither counsel for the defence nor the Deputy Public Prosecutor put forward such a possibility. Still, in our view, failure to put this aspect of the case to the Assessors amounted to misdirection.

With regard to the third main ground of appeal argued by Mr. Woodward — that the appellant's defence of an alibi was put to the Assessors by the learned trial Judge in a way which amounted to misdirection — we set out what the learned trial Judge said to the Assessors. He said :—

> Well, now we come to the defence. The defence is a defence of **alibi**. As the learned Deputy pointed out it would have been better had the accused put his defence of **alibi** at the very earliest opportunity. That, of course, is for you to consider. You have seen him. You must remember, of course, that he is possibly an ignorant man and he may possibly have kept the defence of **alibi**, as I heard a learned counsel say in a case in this country that he did not put up the case of **alibi** earlier as he was keeping it 'up his sleeve'. In that case he did not even cross-examine any of the prosecution witnesses. But that is entirely for you to say.

So far as we can trace there are two local decisions of the Court of Appeal on the question of how far a trial Judge may go in commenting on an accused's failure to disclose his defence of an alibi prior to the trial. They are *R. v. Chhui Yi*[1] and *Haji Sulaiman v. P. P.*[2].

We have no comments to make on the decision in the former case. In the latter case the following passage occurs in the judgment (at page 186) :—

> In England it may be proper for a trial Judge to observe that the failure to disclose an **alibi** defence in time to afford an opportunity of its being tested is something to be borne in mind with reference to the value of the defence.
>
> In this country, however, it seems to us that such an observation can hardly ever be made in fairness to the accused, because the Judge can seldom if ever know to what extent the police were aware of an intended **alibi** defence before trial.

Read in its context this passage can only be intended to relate to the failure of an accused to disclose his alibi to the police and can have no application to a trial Judge commenting on the failure of an accused to disclose his alibi defence at the Preliminary Enquiry. This is clear from the Report, because that particular passage comes immediately after observations made that section 113 of the Criminal Procedure Code forbids the giving in evidence of any statement made to the police by an accused person in the course of a police investigation.

There can be no objection to a trial Judge commenting in his summing up to Assessors on the failure of an accused to disclose his alibi defence at the Preliminary Enquiry provided :—

(a) The trial Judge points out that the Preliminary Enquiry is the first opportunity an accused person has of disclosing such a defence.

(b) That, following **R. v. Littleboy**[3] the trial Judge directs the Assessors that failure to disclose an **alibi** defence at the Preliminary Enquiry is a matter which may detract from the **weight** to be given to such a defence.

What we have just said does not cover emergency cases committed for trial under the Emergency (Criminal Trials) Regulations, 1948, on account of the special provisions of Regulation 8 thereof and of Regulation 33 of the Emergency Regulations, 1948.

Applying the principles we have laid down above to the appeal before us, we consider that the learned trial Judge went further than he should have done in his comments to the Assessors. Instead of confining his comments to the *weight* to be given to the alibi he suggested to the Assessors that the appellant might have deliberately kept this defence 'up his sleeve' until the trial. On that we would draw attention to the last paragraph of the judgment in the *case of Haji Sulaiman* (*supra*) at page 186 of the report, that such a suggestion goes beyond the limit laid down in the case of *R. v. Littleboy* (*supra*).

Although there was this misdirection we are of the opinion that on the whole of the facts and with a correct direction the only reasonable and proper conclusion which the Assessors could have come to would have been to reject the alibi so that this is a case to which the provisions of section 422 of the Criminal Procedure Code can properly be applied to cure the irregularity. Accordingly the third ground of appeal fails.

If the second ground of appeal had been the only remaining ground, we would have been inclined to order a new trial, because, as stated previously in this judgment, the Assessors should have been directed as to the possibility of the deceased having died from violence from a source other than the beating he received from the appellant and Duleep Singh.

But since we have already decided that the first ground of appeal succeeds it would be wrong to order

a new trial which would enable the prosecution to take advantage of their own default by calling a witness whom they should have called at the trial and who, as stated previously in this judgment, was present in Court at the trial.

The only remaining question for us to decide is whether there is sufficient evidence on the record which would entitle us to alter the conviction for murder to one for any lesser offence. As to that there is the evidence of Lall Din that the deceased's head had been smashed and was bleeding from the blows the deceased had received from the appellant and Duleep Singh. In the absence of any medical evidence we cannot presume that any bones had been broken, but Lall Din's evidence makes it certain that the appellant and Duleep Singh caused hurt to the deceased. Therefore a conviction for voluntarily causing hurt can be substituted for that of murder.

Accordingly we quash the conviction for murder and the sentence of death, and substitute therefor a conviction for voluntarily causing hurt under section 323 of the Penal Code. As regards sentence, we impose the maximum sentence under that section i.e. rigorous imprisonment for one year, to commence from the date of this judgment, that is from the 17th of September, 1948.

Order Accordingly.

WONG HENG v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson and Briggs, JJ.) October 2, 1948]

[K.L. — Criminal Appeal No. 97 of 1948]

Criminal Procedure Code Ss. 197, 198 and 199 — Trial with the aid of assessors — Failure of Trial Judge to record the conviction of accused — Whether such omission can be cured under Section 422 of the Criminal Procedure Code.

In this case the appellant was tried for being in possession of a hand-grenade. At the close of the evidence, the learned Trial Judge summed up to the Assessors and both the Assessors gave their opinions that the appellant was guilty of the offence charged. The learned Trial Judge recorded these opinions and also recorded his own opinion that he agreed with them. But there was nothing in the record to show that the learned Trial Judge gave judgment by convicting the appellant as required by Section 198(1) of the Criminal Procedure Code. The record only showed that the appellant was sentenced to death.

Held, that the failure of the learned Trial Judge to record that he gave judgment by convicting the appellant was an irregularity but that such irregularity can be cured under Section 422 of the Criminal Procedure Code.

Cases referred to :—

(1) *Ng Peng Choon v. Public Prosecutor* (1947) M.L.J. 87.

(2) *Govindasamy v. Public Prosecutor* (1949) M.L.J. 101.

(3) *Joseph v. King* (1948) A.C. 215.

(4) *Pulukuri Kotayya v. King Emperor* (1946-47) L.R. 74 I.A. 65.

(5) *Abdul Rahman v. King Emperor* (1926) 54 I.A. 96.

CRIMINAL APPEAL.

M. Edgar for the Appellant.

F. C. Cooke for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Willan, C. J. : — This is an appeal against the conviction of the appellant by the High Court for being in possession of a hand-grenade, an offence contrary to Regulation 4(1)(b) of the Emergency Regulations, 1948.

The appellant was sentenced to death, the death sentence being mandatory on conviction for such an offence.

The trial took place with the aid of Assessors, as required by section 184 of the Criminal Procedure Code.

At the close of the evidence, the learned trial Judge summed up to the Assessors in accordance with section 197 of the Criminal Procedure Code, and both Assessors gave their opinions that the appellant was guilty of the offence charged. These opinions were recorded by the learned trial Judge as was also his own opinion that he agreed with them. Thus the provisions of section 198(1) of the Criminal Procedure Code, and also the requirements laid down by this Court in the case of *Ng Peng Choon v. Public Prosecutor*[1], that the record must show there was positive agreement between the trial Judge and both Assessors or one Assessor, were observed.

There is nothing on the record, however, to show that the learned trial Judge complied with the latter part of the provisions of section 198(1) of the Criminal Procedure Code i.e. that he gave judgment by convicting the appellant.

The record does show that the appellant was sentenced to death, and therefore the requirements of section 199 of the Code were observed.